

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE: : 09-MD-2120 (KAM) (SMG)
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PAMIDRONATE PRODUCTS :
LIABILITY LITIGATION : September 1, 2010
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: Brooklyn, New York
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TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE
BEFORE THE HONORABLE STEVEN M. GOLD
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: DANIEL OSBORN, ESQ.
JOHN VECCHIONE, ESQ.

For the Defendant: ROBERT JOHNSTON, ESQ.
JAMES HUSTON, ESQ.
ERIN BOSMAN, ESQ.
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1 THE COURT: This in In Re: Pamidronate Products
2 Liability Litigation, 09-MD-2120.

3 And I wanted to focus today on the plaintiff's
4 motion to extend time to amend the pleadings and the
5 plaintiff's motion to sever pleadings. With respect to
6 those issues, who will be speaking on behalf of the
7 plaintiffs?

8 MR. OSBORN: Your Honor, this is Dan Osborn, and
9 I'm happy to address the motion for additional time. I
10 think the motion to sever sort of is subsumed in there, but
11 Mr. Vecchione may have some comments on the motion to sever
12 separately.

13 MR. VECCHIONE: Yeah, that's mine, Your Honor. If
14 there are any questions or comments about that, I will
15 discuss those.

16 THE COURT: Thank you very much.

17 Who is on for the defendants and will be
18 addressing, for example, the issues raised in the
19 defendants' response to the plaintiffs' motion to extend
20 time, docket entry 27?

21 MR. HUSTON: This is Jim Huston, Your Honor, with
22 Erin Bosman and Crystal Mckellar. We're here on behalf of
23 APP. I'd be happy to address those issues. I'm sure many
24 of the other defendants would have comments as well.

25 THE COURT: Thank you. Mr. Huston, is it spelled

1 like the city?

2 MR. HUSTON: It is not. It's spelled like the
3 director.

4 THE COURT: Director?

5 MR. HUSTON: John Huston.

6 THE COURT: Oh, yeah, yeah, got it.

7 Okay. Now, let's start then with the motion for
8 extension of time. What struck me, and I guess I'll direct
9 these questions to you, Mr. Osborn, is that I have this
10 defendants' response filed on August 23rd, docket entry 27,
11 and it raises some questions about things that the
12 defendants have been asking the plaintiffs to do that the
13 plaintiffs have not yet done, at least as of the date of
14 that filing.

15 For example, they have asked the plaintiffs to
16 identify which of them have not been able to locate
17 information about the generic Pamidronate supplier for their
18 infusions and to dismiss with respect to any plaintiffs for
19 whom it's been determined that they took only the brand name
20 Pamidronate, which as I understand it is the subject of a
21 different litigation and doesn't involve the defendants in
22 this case.

23 Did I understand, Mr. Osborn, in your view, the
24 two main concerns of the defendants correctly, and if so,
25 what is the plaintiffs' response to those issues?

1 MR. OSBORN: Your Honor, I think the second one
2 you articulated is correct, which is, have we identified for
3 the defendants those plaintiffs who are not pursuing a claim
4 for whatever reason; either they didn't take a generic
5 product or they just elected not to because maybe they only
6 took a generic on two occasions and we decided it's not
7 worth pursuing a claim. That's one group.

8 The first group, though, is not those persons who
9 we have not yet been able to identify the manufacturer,
10 because that's the ongoing process that we need more time to
11 do. So anybody that we don't dismiss is necessarily --
12 we're still conducting the product identification efforts.

13 What the defendants have asked us to do -- and we
14 circulated two stipulations to them last week. I wasn't
15 prepared to do it under their terms because if you were to
16 be privy to the correspondence, there was more to it than
17 that. In any event, we circulated two stipulations to the
18 defendants last week. One said, here are the plaintiffs for
19 whom we are prepared to dismiss the claims against all
20 generic defendant -- generic manufacturer defendants.

21 THE COURT: How many of those are there?

22 MR. OSBORN: I believe there are 30.

23 THE COURT: All right.

24 MR. OSBORN: We sent a second stipulation to the
25 defendants, identifying those cases in which we believe we

1 have identified the specific manufacturer or manufacturers
2 who provided the Pamidronate that our clients took, and with
3 that stipulation, we offered to dismiss the claims against
4 the other generic manufacturer defendants. There are five
5 in this case. In many instances, we've identified one or
6 two that we think are the culprit, and we're prepared to
7 dismiss the other two or three or four. We that stipulation
8 around. That covers, I believe, 17 people.

9 With the remainder, we're still conducting the
10 product identification, and that's what we need more time
11 for, and I think we've spelled out why. I'm happy to get
12 into that if the Court has any questions.

13 THE COURT: Mr. --

14 MR. VECCHIONE: Vecchione.

15 THE COURT: Mr. Vecchione, are you the one who's
16 addressing this issue?

17 MR. VECCHIONE: Oh, no.

18 THE COURT: Okay.

19 MR. VECCHIONE: I'm for plaintiff. I thought you
20 wanted to hear from defendants.

21 THE COURT: No, I was trying to get to Mr. Huston.
22 I just wrote down all the names in a list without proper
23 attribution. Forgive me.

24 Mr. Huston, did Mr. Osborn's remarks accurately
25 describe what you've received, and if so, what issues you

1 think are worth bringing to the Court's attention remain in
2 your August 23rd submission?

3 MR. HUSTON: I think his comments were fairly
4 accurate. He said that if the Court were aware of the
5 correspondence, you'd have a fuller understanding of it. I
6 think the Court has the correspondence. They were attached
7 to our --

8 THE COURT: Yeah, but I didn't read it all.

9 MR. HUSTON: I don't think you really need to.

10 THE COURT: I want to know what you still need
11 that you don't have --

12 MR. HUSTON: Right.

13 THE COURT: -- that you think you reasonably
14 deserve.

15 MR. HUSTON: The one thing that jumps out at me is
16 the process of getting the understanding that they have in
17 some cases and not in most of the others. And that is the
18 state of affairs on what they do have in terms of product
19 i.d., what medical records they have.

20 There is an order in front of the Court, I
21 believe, from the May hearing -- no, before that -- that
22 required them to produce the medical records in a rolling
23 way; that once they receive them, they would forward them on
24 to us. That I think was intended to allow us to not only
25 see what was going on and what medical records were being

1 obtained but also help on this product identification issue
2 by looking at MDC codes and billing records and the like.
3 Maybe we could help streamline it.

4 We have received some medical records from Mr.
5 Vecchione, but I don't believe we've received any from Mr.
6 Osborn. The only correspondence we've received from him on
7 that that I recall right now is that he's asked us to pay
8 for the costs of those medical records, and we've been
9 corresponding about that.

10 But I think that is falling short of what the
11 Court was trying to accomplish, which is an exchange of
12 medical records as they came in. We don't have any of them.
13 We don't have any amended complaints, which were required to
14 be filed. That's the extension and I understand that.
15 We're sympathetic to the difficulty of getting some of the
16 medical records.

17 But it seems that the ones that have been received
18 should be produced, and it seems that those that can be
19 amended should be amended by all the plaintiffs, in terms of
20 the complaints. And while we are happy to cooperate with
21 these dismissals and we've looked at them and defendants are
22 discussing them, we don't have the documents on which those
23 dismissals are based. So we're assuming that they've got it
24 right, that they're going to have the correct defendants
25 still in the case.

1 We're a little concerned with being left in a case
2 that we shouldn't be or being in a case that we should not
3 be in, where other defendants who should be are out. So it
4 would be nice to be able to see the medical records on which
5 those dismissals are based. Those are my concerns.

6 THE COURT: Mr. Osborn, is there any reason why
7 those shouldn't be made available for inspection and
8 copying?

9 MR. OSBORN: No, Your Honor. We've been -- we've
10 offered that for several months now, but we did want to be
11 reimbursed for a portion of the costs that we've incurred in
12 collecting these records. Mr. Huston and I have
13 corresponded a couple of times. When we send these
14 authorizations out or when we send these subpoenas out, on
15 most occasions I would say, we get charged by --

16 THE COURT: That's all right. You can make them
17 available for inspection and copying. You don't hold the
18 documents hostage to a dispute over who's going to pay. You
19 make them available for inspection and copying and if you
20 think you're entitled to something that the defendants won't
21 agree to, you make an application to the Court.

22 MR. OSBORN: I'm happy to do that, Your Honor.

23 THE COURT: All right, we'll proceed in that
24 manner and I'll expect them to be made available even before
25 the dispute over who pays for them is resolved.

1 MR. OSBORN: Okay.

2 THE COURT: All right?

3 MR. OSBORN: Yes.

4 THE COURT: Mr. Huston, is there anything else in
5 your August 23rd submission you'd like to raise with me?

6 MR. HUSTON: We have the issue of the updated
7 chart, Your Honor. That was something that Your Honor had
8 requested and that we would find helpful that we have not
9 received. The chart on whose records have been obtained and
10 the progress on the product identification.

11 THE COURT: Is that not readily inferrable from
12 the stipulations Mr. Osborn previously described?

13 MR. HUSTON: No, it's not.

14 THE COURT: Mr. Osborn?

15 MR. OSBORN: I don't know why it wouldn't be. In
16 the stipulations, we say, we're prepared to dismiss these
17 people for whatever reason. And with respect to those for
18 which we've identified the manufacturer, we say, we're
19 prepared to dismiss defendant X, Y and Z.

20 THE COURT: Yeah.

21 MR. HUSTON: There are numerous others that we
22 have no information on whatsoever, and we'd like to have the
23 update on them. It was our understanding that that's what
24 the Court requested.

25 THE COURT: Well, I assume that with respect to

1 the others, product identification efforts are ongoing. The
2 records that have been secured will be made available
3 regardless of any debate over who should pay what amount
4 toward them.

5 Am I right in the inference I draw, Mr. Osborn,
6 that you're still making product identification efforts with
7 respect to every plaintiff who is not in one of those stips?

8 MR. OSBORN: That's correct, Your Honor, and the
9 reason it's taking so long -- and I'll just, if you'll
10 indulge me for 30 seconds --

11 THE COURT: Yeah.

12 MR. OSBORN: Last January, we told the Court that
13 the critical piece of information, in our view, was the
14 wholesaler, the identification of the wholesaler. We have
15 the manufacturer, goes to the wholesaler, wholesaler goes to
16 the infusion center, where our clients get infused. They
17 never see a label, they never see a package (ui).

18 THE COURT: Yeah.

19 MR. OSBORN: The wholesaler information was
20 critical. We begged and pleaded with the defendants to
21 voluntarily turn over that information and they absolutely
22 refused. When Mr. Huston says that they're trying to help
23 us identify, I couldn't think of anything further from the
24 truth in this case so far.

25 THE COURT: Well, there's no need for that kind of

1 rhetoric at this stage.

2 MR. OSBORN: Your Honor, the only reason I raise
3 it is because in Mr. Huston's letter or in the defendants'
4 opposition, they say that we should have been doing this
5 wholesaler stuff months ago, but we couldn't because we
6 didn't have the names. We just got those in July and we
7 have now started sending out subpoenas for the wholesalers.
8 That's why there's this big lag time, because we just got
9 the stuff that we've been asking for since January.

10 THE COURT: All right.

11 Getting back to Mr. Huston's request for the
12 chart, I think you said that I was correct to say that if --
13 the plaintiffs fall into three categories. Either they're
14 agreeing to dismiss their claims because they didn't take
15 generic Pamidronate or for other reasons personal to them;
16 2) they've identified one or more specific Pamidronate --
17 generic Pamidronate manufacturers and they're limiting their
18 claims to the ones that they've identified; or 3) product
19 identification remains underway.

20 Does that cover the universe, as you understand
21 it, Mr. Osborn?

22 MR. OSBORN: Yes, sir.

23 THE COURT: And the first two categories, those
24 who are dismissing and those who've identified specific
25 generic manufacturers whose Pamidronate was administered to

1 them, are listed on the stipulations. And every plaintiff
2 who isn't listed took generic Pamidronate -- may have taken
3 generic Pamidronate and product identification is still
4 underway.

5 MR. OSBORN: Correct.

6 THE COURT: Mr. Huston, what would be on the chart
7 that's not encompassed by that?

8 MR. HUSTON: I would like to know the progress, if
9 any, that's been made on all of those that remain so far
10 unidentified.

11 THE COURT: Well, all of the medical records that
12 have been obtained are available for your inspection review
13 at a mutually convenient, prompt time. I don't see the
14 point of a narrative description of the status of all of the
15 other plaintiffs, but you can certainly look at every
16 document that they've obtained from a third party with
17 respect to those plaintiffs at your convenience.

18 MR. OSBORN: This is Mr. Osborn. We do -- when we
19 send out subpoenas, we do send copies of the subpoenas to
20 defense counsel, so they see where we're sending subpoenas
21 out.

22 THE COURT: Okay. Now that you've started to get
23 returns on them, you'll make the returns available as well.
24 Hopefully, that will help Mr. Huston get a clearer picture
25 of where you are.

1 So let's talk about severance for a minute. I
2 understand that that's uncontested.

3 Who's going to talk about that on the defendants'
4 side?

5 MR. HUSTON: We don't have any problem with that,
6 Your Honor. It's a procedural step. It's appropriate.

7 THE COURT: Now, I assume -- I just have some case
8 management questions that I guess I'll address to Mr.
9 Vecchione.

10 MR. VECCHIONE: Yes.

11 THE COURT: I'm assuming that although you want to
12 sever pleadings, we're still going to proceed for case
13 management purposes under one, consolidated MDL number, in
14 terms of the filings with the Court and when we hold
15 conferences.

16 MR. VECCHIONE: That is correct. I only want what
17 I'll call a sub-file. So that for instance, I may have one
18 case that's in Mr. Osborn's category of time to dismiss,
19 okay?

20 THE COURT: Right.

21 MR. VECCHIONE: I will then get a stipulation
22 together and we will -- I'll dismiss that one, but I won't
23 have a bunch of plaintiffs on -- they will have their own
24 number.

25 THE COURT: I see.

1 MR. VECCHIONE: All right? So -- and then there's
2 going to -- I think about -- maybe about a third of mine,
3 I'm not sure, you know -- I want to amend the complaint and
4 drop some and put in others. And I think it will be far
5 easier -- now, I'm not going to have all the same
6 defendants. The defendants will differ. Amendments will
7 need to be put in, so I think it's time to sever and do that
8 individually.

9 THE COURT: Well, I'm not opposed to that in
10 principle. I'm just a little concerned, looking down the
11 road, about the following: I don't want to suggest, by
12 approving the severance motion, that I'm surrendering the
13 possibility of joint adjudication of issues in common.

14 MR. VECCHIONE: Nor would I expect you to, Your
15 Honor. That's not my intent.

16 THE COURT: So if the defendants move for summary
17 judgment, for example, on the grounds that the plaintiffs'
18 Dalbert expert on causation doesn't meet the standards for
19 admissibility and there's no other proof of causation, I
20 assume that we all understand that that could be handled, if
21 the Court approves it or demands it, on a consolidated basis
22 that would be binding on a res judicata theory against all
23 of the plaintiffs, regardless of separate pleadings.

24 MR. VECCHIONE: I would want to look at that but I
25 believe that's how it's normally done in what I call case-

1 wide experts. In other words, the plaintiffs and the
2 defendants have what are called case-wide experts; for
3 instance, does this drug cause this disease, rather than,
4 did this drug cause this guy's disease?

5 THE COURT: Right.

6 MR. VECCHIONE: I think that's the way it goes,
7 Your Honor.

8 THE COURT: Well, I guess I just wanted to say it
9 out loud to everybody on the record, because I don't want
10 anyone to be able to argue that the Court's approval of this
11 severance motion implies approval or suggests or caused
12 reasonable reliance by plaintiffs on the suggestion that all
13 issues would now be handled on a plaintiff-by-plaintiff
14 basis, without the Court's authority to consolidate or
15 approve a request to consolidate issues for motion practice
16 or trial.

17 MR. VECCHIONE: There's no (ui) here, Your Honor.
18 We agree. I did not intend by my --

19 THE COURT: Good.

20 MR. VECCHIONE: It was purely an administrative
21 convenience.

22 THE COURT: Okay. I understood it that way but I
23 just wanted to be clear with everyone and to give everyone a
24 record to go back to. I know these litigations sometimes
25 take a long time to resolve. Some of the players from the

1 beginning aren't there at the end and I'm involved in
2 another MDL where we're sort of scratching our heads about
3 what we meant five years ago when we said something. That's
4 my goal in articulating this today.

5 So I will grant the motion for the severance on
6 the understandings that we've just articulated. I don't
7 think there's anything for me to grant -- I'll grant the
8 motion for extension of time, subject to the discussion we
9 had today about the plaintiffs' willingness to make
10 discovery and being advised of the two stipulations that
11 plaintiffs submitted.

12 Is there anything else anybody wants to bring up
13 while we're all together on the phone? Plaintiffs?

14 MR. OSBORN: No, Your Honor.

15 THE COURT: Defendants?

16 MR. JOHNSTON: Your Honor, this is Robert Johnston
17 for Sandoz from Hollingsworth LLP. I just have one
18 question.

19 In severing the severance, it's my understanding
20 that the plaintiffs represented by Mr. Vecchione do not
21 intend to file currently amended complaints. I think that's
22 an administrative challenge that we should at least all be
23 on the same page on because normally, when you sever, you
24 file an individual complaint for the severed case.

25 THE COURT: Mr. Vecchione, I'm not sure I followed

1 what Mr. Johnston was saying.

2 MR. VECCHIONE: I did, and I do not intend -- in
3 other words, in order to file an amended complaint, I merely
4 want these cases -- each group that I put in my motion
5 assigned a new number by the clerk underneath the MDL. They
6 will go on the same complaint they've always had and then,
7 when that's done, I will amend the others individually, as I
8 get information or hopefully all at once.

9 MR. JOHNSTONE: Your Honor, my issue with that is
10 that this Court's order setting a deadline for amendment was
11 intended to insure that, to the extent the plaintiffs
12 already know parties who should be dropped, they're dropped.
13 And Mr. Vecchione knows, for example, a number of cases
14 where Sandoz should not be a defendant anymore, and this
15 procedure is going to allow him to sever without
16 effectuating a dismissal of folks that he already knows or
17 his client already knows should be dismissed.

18 THE COURT: I'm sorry, I guess I'm under a mis-
19 impression then. I thought that Mr. Osborn told me that
20 stipulations were forwarded dismissing the claims of
21 plaintiffs who either have determined they didn't take
22 generic Pamidronate or were not pursuing their claims, and
23 limiting the claims of specified plaintiffs where the
24 particular generic Pamidronate manufacturer whose drug was
25 administered to him or her has been identified.

1 MR. JOHNSTONE: That's correct, Your Honor, Mr.
2 Osborn has done that. That has not happened with respect to
3 Mr. Vecchione's plaintiffs.

4 THE COURT: I didn't realize we weren't moving in
5 tandem in this respect.

6 MR. VECCHIONE: Your Honor, I have not -- I have
7 not done that. I have a limited number of plaintiffs and I
8 want to be severed so that I can administratively do it in a
9 more -- in a manner I thought it would be better to keep
10 track of. I had hoped to do this all at once; I didn't want
11 to do it in dribs and drabs is my -- was the purposes of
12 this.

13 THE COURT: Well, I don't mind if it's more
14 convenient for you to do it at once, but why shouldn't you
15 at least forward -- then forward the chart that Mr. Huston
16 was talking about, that Mr. Osborn persuaded me is mooted by
17 what he's already done but you haven't?

18 MR. VECCHIONE: Your Honor, I don't have any
19 objection to doing that. I had suggested another way for my
20 limited amount of plaintiffs, but I don't have a big
21 objection to it.

22 THE COURT: Well, I don't care; anything that gets
23 the defendants the information about what to expect and
24 makes the underlying documents available to them so they can
25 talk to you if you're proceeding on what they perceive to be

1 an error is fine with me.

2 MR. VECCHIONE: All right.

3 THE COURT: As long as it's sufficiently
4 communicated.

5 MR. VECCHIONE: I'd like two weeks to put together
6 my chart and make -- to do that, but yes, I could do that.

7 THE COURT: All right.

8 Do we have a date that brings us back together
9 again?

10 MR. HUSTON: We do. It's September 8th, Your
11 Honor. It's Jim Huston. I was wondering if we really need
12 to get together on the 8th, given the progress we've made
13 today.

14 THE COURT: It doesn't sound like it makes sense
15 to do that. Does anybody anticipate needing a conference on
16 the 8th?

17 MR. OSBORN: No, Your Honor.

18 MR. JOHNSTONE: No, Your Honor.

19 THE COURT: When will the -- how much time am I
20 extending this process for again?

21 MR. OSBORN: I believe it's October 20th, Your
22 Honor.

23 THE COURT: So does it make sense to push our
24 September 8th conference into November, after that process is
25 over?

1 MR. OSBORN: This is Dan Osborn. I think so.

2 THE COURT: Let me open my calendar, if you'll
3 bear with me for a minute while my computer catches up to
4 us, and we'll look for a date in November when we can meet.

5 (Pause in Proceedings)

6 THE COURT: How do you like Tuesday, November 9th
7 at 2:00?

8 MR. VECCHIONE: Your Honor, this is John
9 Vecchione. If I may attend by conference phone, that would
10 be fine. There's a trial going on that I may -- I'll be at,
11 but I'm sure I can take a break to do that. I don't want my
12 schedule, which is very busy in November, to hold this up.

13 THE COURT: Is there anybody -- I don't have an
14 objection to that. Is there anybody else who would find
15 that a difficult date? All right.

16 I would like to get letters from you identifying
17 the issues you would like to raise with the Court by
18 November 3rd and responses to those letters by November 5th,
19 so that we have an opportunity to hit the ground running
20 when we meet, okay?

21 MR. OSBORN: Yes, Your Honor.

22 THE COURT: Thanks very much, everybody. Enjoy
23 the rest of your summer, which I guess is down to about 48
24 hours or so, and I'll see you in the fall.

25 MR. OSBORN: Thank you, Your Honor.

1 MR. HUSTON: Thank you.

2 THE COURT: Goodbye.

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I certify that the foregoing is a correct transcript
from the electronic sound recording of the proceedings in
the above-entitled matter.

A handwritten signature in black ink, appearing to read 'EB', with a long horizontal stroke extending to the right.

ELIZABETH BARRON

October 14, 2010